NO. 97617-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

BENJAMIN BATSON,

Respondent.

AMICUS CURIAE BRIEF OF THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

Cristina Sepe, WSBA 53609
Assistant Attorney General

Peter B. Gonick, WSBA 25616
Deputy Solicitor General

Office ID 91087
PO Box 40100
Olympia WA 98504-0100
(360) 664-0869
cristina.sepe@atg.wa.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

I. INTRODUCTION

The Legislature amended RCW 9A.44.128(10)(h) so that an individual who was required to register as a sex offender while residing in the state of conviction would have to register as a sex offender in Washington. The Legislature made a policy decision that ensured that residents with out-of-state convictions would need to register in the State and delineated the elements for failing to register. The State's reference to status as a registrable sex offender under the laws of other states is not an unconstitutional delegation of the legislative function.

All 50 states, as well as the federal government, have sex offender registration and community notification laws, and many states have equivalent laws requiring out-of-state sex offenders to register for offenses that were registrable in the state of conviction. Upholding the law would promote uniformity with other states' laws and ensure substantial compliance with the federal Sex Offender Registration and Notification Act. The Court should reverse the Court of Appeals.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General files this amicus curiae brief on behalf of the State of Washington. The Attorney General's powers include the

submission of amicus curiae briefs on matters affecting the public interest. *See Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 208-12, 588 P.2d 195 (1978).

The State has an interest in the health, safety, and well-being of its residents, which the sex offender registration statute aims to promote. *See Rousso v. State*, 170 Wn.2d 70, 83, 239 P.3d 1084 (2010) (recognizing "substantial state interest" in protecting "the health, welfare, safety, and morals of its citizens"); *State v. Ward*, 123 Wn.2d 488, 509, 869 P.2d 1062 (1994) ("[T]he Legislature has spoken clearly that public interest demands that law enforcement agencies have relevant and necessary information about sex offenders residing in their communities." (citing Laws of 1990, ch. 3, § 401)). In addition, the State has a concomitant interest in upholding statutes, including the one challenged here, against constitutional challenge.

III. ISSUE ADDRESSED BY AMICUS CURIAE

Washington residents are required to register as a sex offender based on an out-of-state conviction if they were required to register as a sex offender in the state of conviction. Does this requirement improperly delegate the legislative function where the Legislature intended to close a gap in the statutory scheme which had allowed some sex offenders convicted out-of-state to not register upon becoming a resident, and where

the requirement creates uniformity among states in conformity with federal law encouraging uniformity?

While this amicus curiae brief focuses on the permissible delegation of the legislative function, the State fully agrees and joins Petitioner's position that the State's sex offender registration statute does not violate ex post facto, double jeopardy, and equal protection.

IV. STATEMENT OF THE CASE

The State relies upon the facts as set forth by the Court of Appeals in its opinion, *State v. Batson*, 9 Wn. App. 2d 546, 547-49, 447 P.3d 202, *review granted*, 194 Wn.2d 1009 (2019).

V. ANALYSIS

A. The Failure to Register as a Sex Offender Statute is Complete and Does Not Unconstitutionally Delegate Legislative Power

The Washington Constitution vests the legislative authority of the State in the Legislature. Const. art. II, § 1. This means the Legislature is proscribed from "delegating its purely legislatively functions" and that "[a] statute must be complete in itself when it leaves the hands of the Legislature." *Diversified Inv. P'ship v. Dep't of Soc. & Health Servs.*, 113 Wn.2d 19, 24, 775 P.2d 947 (1989).

At issue in this case is whether the Legislature unconstitutionally delegated its power to define crimes in relation to the failure to register as a

sex offender statute. The elements for failure to register as a sex offender are generally: (1) prior to the charging period, the defendant was convicted of a sex offense; (2) that, during a specific time period, the defendant was required to register because of the sex offense conviction; and (3) the defendant knowingly failed to comply with the sex offender registration requirement. *See* RCW 9A.44.132 (failure to register as a sex offender); RCW 9A.44.130 (sex offender registration procedures).

The Court of Appeals invalidated the portion of RCW 9A.44.128(10)(h), which defines "sex offense" as an "out-of-state conviction for an offense for which the person would be required to register as a sex offender while residing in the state of conviction[.]" *See Batson*, 9 Wn. App. 2d at 553-54.[1] The Court should reverse this decision because the Legislature specified the elements of RCW 9A.44.132, and the statute was complete upon enactment. As explained further below, the Legislature intended for residents who had out-of-state convictions and were required to register in their states of conviction to register in in this State. This intent is not altered by other states' determinations of which offenses are

[1] Recently, a divided court of Division II of the Court of Appeals vacated the failure-to-register conviction of a defendant who was required to register as a sex offender based on his out-of-state conviction for third degree rape. *See State v. Reynolds*, No. 51630-6-II, 2020 WL 547457 (Wn. Ct. App. Feb. 4, 2020). The court adopted the analysis in *Batson* and concluded that RCW 9A.44.128(10)(h) unconstitutionally delegated the legislative function. Judge Melnick, in dissent, explained that RCW 9A.44.128(10)(h) was not unconstitutional because the statute merely defines one of the elements for failing to register and that the Legislature set out the elements for failing to register. *See id.* at *5-7.

registrable, because the intended policy was not necessarily that a particular sex offense require registration, but to close a loophole where foreign sex offenses did not precisely match Washington's legal definitions. This policy is expressed in the statutory elements and was complete upon enactment. There was no delegation. *See* Suppl. Br. Pet'r at 5-9 (describing cases).

B. The Legislature Amended the Sex Offender Registration Statute to Close a Loophole

The legislative history related, and changes made, to the State's sex offender registration statute show that the Legislature wanted to close a gap in the statutory scheme by requiring out-of-state convicted sex offenders to register with the State's sex offender registry.

In 1990, the Legislature passed the Community Protection Act "in response to citizens' concerns about the State's laws and procedures regarding sexually violent offenders." *In re Personal Restraint of Young*, 122 Wn.2d 1, 11, 857 P.2d 989 (1993). The comprehensive act included a requirement for individuals who committed or had been convicted of a "sex offense" to register his or her home address with local law enforcement. Laws of 1990, ch. 3, § 402. Specific to sex offender registration, the Legislature found:

> The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are

> impaired by the lack of information available to law enforcement agencies about convicted sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in [the] act.

Laws of 1990, ch. 3, § 401. At the time the Act was passed, many other states did not have sex offender registration or notification laws. But, as discussed below, federal legislation conditioned certain federal funding on state adoption of sex offender registration requirements. And by 1996, all 50 states had implemented a sex offender registry. *See Smith v. John Doe I*, 538 U.S. 84, 89-90, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

The Community Protection Act has been legislatively modified several times since its enactment to broaden its scope. For example, in 1995, the registration statute was expanded so that sex offenders under federal jurisdiction and offenders found not guilty by reason of insanity were required to register. *See* Laws of 1995, ch. 248, § 1.

Relevant to the present case, in 2010, the Legislature amended RCW 9A.44.128 by modifying the definition of "sex offense" to include:

> Any federal or out-of-state conviction for: *An offense for which the person would be required to register as a sex offender while residing in the state of conviction*; or, if not required to register in the state of conviction, an offense that under the laws of this state would be classified as a sex offense under this subsection, unless a court in the person's

> state of conviction has made an individualized determination that the person should not be required to register[.]

Laws of 2010, ch. 267, § 1 (emphasis added). Before this change, "sex offense" had been defined, in part, as "[a]ny federal or out-of-state conviction for an offense that under the laws of this state would be classified as a sex offense under this subsection[.]" RCW 9A.44.130(10)(a)(iv) (2008).

This 2010 legislative change was prompted by a 2008 Court of Appeals decision in *State v. Werneth*, 147 Wn. App. 549, 197 P.3d 1195 (2008). *See* Washington State Sex Offender Policy Board, *Annual Report to the Legislature 2009* (*2009 Report*), 17, 57-58, https://sgc.wa.gov/sites/default/files/public/sopb/documents/12_Dec_09_SOPB_%20Full_Report.pdf (noting *Werneth*'s impact on the Board's policy recommendations).[2]

Werneth addressed the comparability process in which defendants convicted of out-of-state sex offenses were required to register in Washington. *See Werneth*, 147 Wn. App. at 553. There, the court held that the defendant's conviction of child molestation in Georgia was not

[2] The Legislature created the Sex Offender Policy Board in 2008. The Legislature's intent was to promote a coordinated and integrated response to sex offender management and create an entity to respond to issues that arise, such as integrating state and federal laws in a way that enhances the State's interest in protecting the community with an emphasis on public safety.

comparable to a Washington felony sex offense because Georgia's statute "criminalizing child molestation did not include two essential elements required by the Washington crime of attempted second degree child molestation: (1) the victim is 'not married to the perpetrator,' and (2) 'the perpetrator is at least thirty-six months older than the victim.'" *Werneth*, 147 Wn. App. at 554 (comparing former RCW 9A.44.086(1) with former Ga. Code Ann. § 16-6-4(a)). The Court of Appeals noted that the defendant's birth date was never presented to the Georgia court and nothing in the record suggested that the defendant "was not married to his Georgia victim." *Id.* at 555. Accordingly, the defendant was not subject to sex offender registration in Washington despite the defendant's child molestation conviction. *Id.*; *see also State v. Howe*, 151 Wn. App. 338, 351-52, 212 P.3d 565 (2009) (vacating convictions for failure to register as a sex offender because defendant's California conviction for lewd acts upon a child was not legally comparable to second degree child molestation under Washington law).

The significance of *Werneth* and *Howe* was that certain out-of-state sex offenders would not have to register in Washington—even for serious sexual offenses against children.

The Sex Offender Policy Board considered *Werneth*'s comparability requirements in making its policy recommendations. *See 2009 Report* at 57-58. Specifically, the Board noted law enforcement's limited resources and inability to obtain out-of-state records efficiently, and that legal comparability analysis could be "very complicated." *Id.* at 57. The Board's report also noted that a subset of out-of-state offenses that are clearly sex offenses but lacked an element of Washington law meant that those offenders would not be required to register. *Id.* Thus the Board unanimously recommended to the Legislature the requirement that sex offenders register in the State if they were required to register in their state of conviction or under federal law. *Id.* at 58.

The Legislature subsequently considered the recommendation and passed legislation requiring that a person who is required to register in his or her state of conviction be required to register in Washington unless the person has specifically been relieved of registration by the state of conviction. *See* Laws of 2010, ch. 267, § 1; Final Bill Report on Substitute S.B. 6414, 61st Leg., Reg. Sess. (Wash. 2010).

This change furthers the legislative purpose of registration. If the primary rationale behind sex offender registration is to provide law enforcement with information regarding convicted sex offenders to supervise those individuals, enable investigations, and apprehend offenders,

see Laws of 1990, ch. 3, § 402, then law enforcement should have ready access to information about new residents who move into that law enforcement agency's jurisdiction from out of state. *See also State v. Peterson*, 168 Wn.2d 763, 773-74, 230 P.3d 588 (2010) ("The purpose of the sex offender registration statute is to aid law enforcement in keeping communities safe by requiring offenders to divulge their presence in a particular jurisdiction."). Those policy goals are frustrated if sex offenders residing in Washington are not required to register, despite being required to register in the state of conviction.

Other state courts that have applied similar comparability analyses as the Court of Appeals in *Werneth* have discussed legislative fixes to close loopholes where an out-of-state sex offender would not have to register in that state. In those instances, courts have noted that state legislatures could amend sex registration statutes to require out-of-state offenders to register for any offense that was registrable in the state of conviction, as our Legislature did here. *See State v. Hall*, 2013-NMSC-001, 294 P.3d 1235, 1240-41 ("If the Legislature is disturbed by this possibility [where out-of-state sex offenders will not have to register in New Mexico], it is free to amend SORNA once again."); *State Dep't of Pub. Safety v. John Doe I*, 425 P.3d 115, 125 (Alaska 2018) (Stowers, C.J., concurring) (explaining that the Alaska Legislature could consider a "more inclusive approach" to

require out-of-state sex offenders to register in Alaska for any offense for which they were required to register as a sex offender in the state of conviction).

Faced with the concern that some out-of-state sex offenders would not have to register in the State, even for serious offenses, the Legislature made the policy decision to require out-of-state sex offenders to register for any offense that was registrable in the state of conviction. While other states may vary on which sex offenses require registration, it does not change the Legislature's intent to require registration for out-of-state offenders moving to this State.

C. The State's Statutory Scheme Complies With the Federal Sex Offender Registration Law, Which Was Designed to Make the Existing "patchwork" of State and Federal Systems "more uniform and effective"

The Legislature's efforts to close sex offender registration loopholes is consistent with and complies with the federal policy of promoting greater uniformity for state and federal sex offender registration statutes.

In 1994—four years after the Washington Legislature passed the Community Protection Act—Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. § 14071). Until

that point, registration systems were the product of state laws. *See* Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 Drake L. Rev. 741, 746-49 (2016). The Wetterling Act encouraged states to adopt sex offender registration laws that met certain minimum standards by making the enactment of such laws a condition of receiving certain federal funding. *See Smith*, 538 U.S. at 89-90. By 1996, every state, along with the District of Columbia, had passed a sex offender registration law. *Id.*

In 1996, Congress strengthened the minimum federal standards by adding a mandatory community-notification provision to the Wetterling Act. *See* Megan's Law (1996), Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. § 14071(e)). Congress also bolstered national efforts to ensure sex offender registration by directing the Federal Bureau of Investigations to create a national sex offender database, requiring lifetime registration for certain offenders, and making the failure of certain persons to register a federal crime. *See* Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. §§ 14071, 14072, 170102).

Despite those enactments and efforts, Congress also grew concerned about "loopholes and deficiencies" in existing registration and notification statutes, which resulted in an estimated 100,000 sex offenders—nearly

one-fifth of offenders in the country—becoming "missing" or "lost." H.R. Rep. No. 109-218(I), Pt. 1, at 20, 26, 2005 WL 2210642. To address the concerns that sex offenders could attempt to evade registration requirements and the consequences of registration violations, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (34 U.S.C. §§ 20901-20903). *See Reynolds v. United States*, 565 U.S. 432, 435, 132 S. Ct. 975, 181 L. Ed. 2d 935 (2012) ("[SORNA] reflects Congress' awareness that pre-Act registration law consisted of a patchwork of federal and 50 individual state registration systems. The Act seeks to make those systems more uniform and effective."). SORNA's declared purpose is "to protect the public" by "establish[ing] a comprehensive national system for the registration" of "sex offenders and offenders against children[.]" 34 U.S.C. § 20901.

SORNA established new federal mechanisms to support state registration schemes and to foster information sharing among jurisdictions. SORNA also sought uniformity by "setting forth comprehensive registration-system standards; by making federal funding contingent on States' bringing their systems into compliance with those standards; by requiring both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current); and by creating federal criminal sanctions applicable to those who violate the Act's

registration requirements." *Reynolds*, 565 U.S. at 435; *see, e.g.*, 34 U.S.C. § 20927(a) (making certain federal funds contingent on state compliance with SORNA's provisions).

As to the State's compliance with SORNA, one of several major requirements imposed by SORNA is that a jurisdiction's registration scheme must capture offenses from its jurisdiction as well as other jurisdictions, along with federal, military, and foreign offenses. *See* 34 U.S.C. §§ 20911, 20912; *see also* The National Guidelines for Sex Offender Registration and Notification: Final Guidelines, 73 Fed. Reg. 38030 (July 2, 2008). The U.S. Department of Justice has evaluated and concluded that Washington's registration requirement for out-of-state convictions, requiring registration if the person would be required to register as a sex offender while residing in the state of conviction, captures many of the offenses required to be registered by SORNA. *See* U.S. Dep't of Justice, *SORNA Substantial Implementation Review: State of Washington* (Aug. 17, 2011), https://www.smart.gov/pdfs/sorna/washington-hny.pdf.

Massachusetts, by contrast, is a state found to be out of compliance with this SORNA requirement. The state requires registration for a list of state offenses "or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority." *See* Mass. Gen. Laws ch. 6, § 178C. But the Department of Justice expressed concern with

a class of offenders who are not required to register under Massachusetts law: where "an offender is convicted in another jurisdiction, and the offense is not similar to a registerable Massachusetts offense[.]" U.S. Dep't of Justice, *SORNA Substantial Implementation Review: Commonwealth of Massachusetts* 2 (Nov. 2012), https://www.smart.gov/pdfs/sorna/massachusetts-hny.pdf. The agency thus concluded Massachusetts' registration law "[did] not meet SORNA requirements." *Id.*

RCW 9A.44.128(10)(h) complies with SORNA's requirement to include offenses from out-of-state jurisdictions in its registration scheme. The statute also addresses SORNA's concern that sex offenders could attempt to evade registration requirements, or the consequences of registration violations, because without the amendment sex offenders could evade registration by moving from one state to another that did not have an offense that precisely matched the offense of conviction.

D. Several States Have Passed Similar Reciprocity Laws That Require Out-Of-State Offenders to Register for Offenses That Were Registrable in the State of Conviction

Washington is not unique in requiring registration based on conviction statuses from other state jurisdictions. Many states "have passed laws requiring out-of-state sex offenders to register for any offense that was registrable in the state of conviction." *Hall*, 297 P.3d at 1241.

For example, Oregon imposes registration requirements for those "convicted in another United States court of a crime" (a) "[t]hat would constitute a sex crime if committed in [Oregon]" and (b) "[f]or which the person would have to register as a sex offender in that court's jurisdiction, or as required under federal law, regardless of whether the crime would constitute a sex crime in this [Oregon]." Or. Rev. Stat. § 163A.020(6).

Like Washington and Oregon, many other states have exercised legislative discretion in requiring registration for individuals required to register in their states of conviction. *See, e.g.*, Colo. Rev. Stat. § 16-22-103(3) ("any person convicted of an offense in any other state or jurisdiction, including but not limited to a military or federal jurisdiction, for which the person, as a result of the conviction, is required to register if he or she resided in the state or jurisdiction of conviction"); Ind. Code § 11-8-8-5(b)(1) (defining "sex or violent offender" to include "a person who is required to register as a sex or violent offender in any jurisdiction"); Md. Code Ann., Crim. Proc. § 11-704(a)(4) (requiring registration for "a sex offender who is required to register by another jurisdiction, a federal, military, or tribal court, or a foreign government"); Mo. Rev. Stat. § 589.400(7) (requiring registration for a resident who "has been or is required to register in another state, territory, the District of Columbia, or foreign country, or has been or is required to register under tribal, federal,

or military law"); 42 Pa. Cons. Stat. § 9799.14(b)(23) (defining a Tier I sexual offense as "[a] conviction for a sexual offense in another jurisdiction or foreign country that is not set forth in this section, but nevertheless requires registration under a sexual offender statute in the jurisdiction or foreign country").

These laws from sister states attest to the legislative policy, shared among many states, of preventing evasion of registration requirements, establishing uniformity, and protecting the public. This legislative policy was complete upon enactment, even though it relies on other states to establish the status of whether a Washington resident is required to register. There is thus no improper delegation. *See Diversified Inv. P'ship*, 113 Wn.2d at 30 (explaining that the conditional statute was an "expression of such a legislative choice, not an abdication of its legislative power"); *Alaska S.S. Co. v. Mullaney*, 180 F.2d 805, 816 (9th Cir. 1950) (holding that the Alaska state legislature acted, and not abdicated, on its functions where uniformity was the law's major objective).

VI. CONCLUSION

The Court should uphold RCW 9A.44.128(10)(h), which ensures that the registrations for out-of-state convictions in which individuals would be required to register in that state is captured by this State's registration scheme.

The Legislature made an appropriate policy choice to eliminate concerns that some out-of-state sex offenders would not have to register in this State, even for serious offenses. This permissible exercise of legislative authority also brings the State in compliance with SORNA and is in harmony with other states' registration requirements.

RESPECTFULLY SUBMITTED this 7th day of February 2020.

ROBERT W. FERGUSON
Attorney General

s/ Cristina Sepe
Cristina Sepe, WSBA 53609
Assistant Attorney General

Peter B. Gonick, WSBA 25616
Deputy Solicitor General

Office ID 91087
PO Box 40100
Olympia WA 98504-0100
(360) 664-0869
cristina.sepe@atg.wa.gov

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing was electronically filed in the Washington State Supreme Court and electronically served via the Court's electronic filing system as well as a .pdf version to the listed e-mails:

Jessica Wolfe
Washington Appellate Project
1511 Third Avenue Suite 610
Seattle, WA 98101
jessica@washapp.org

Gavriel Jacobs
Deputy Prosecuting Attorney
King County Prosecutor's Office
516 Third Avenue
Seattle, WA 98104
gavriel.jacobs@kingcounty.gov
PAOAppellateUnitMail@kingcounty.gov

David Montes
King County Department of Public Defense
710 Second Avenue Suite 200
Seattle, WA 98104
david.montes@kingcounty.gov

DATED this 7th day of February 2020, at Olympia, Washington.

s/ Wendy R. Otto
WENDY R. OTTO
Legal Assistant

SOLICITOR GENERAL OFFICE

February 07, 2020 - 3:43 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97617-1
Appellate Court Case Title:	State of Washington v. Benjamin Batson

The following documents have been uploaded:

- 976171_Briefs_20200207153901SC161699_0335.pdf
  This File Contains:
  Briefs - Amicus Curiae
  The Original File Name was 200207_AmicusBrief.pdf
- 976171_Motion_20200207153901SC161699_6885.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  The Original File Name was 200207_AmicusBriefMotion.pdf

A copy of the uploaded files will be sent to:

- david.montes@kingcounty.gov
- gavriel.jacobs@kingcounty.gov
- jessica@washapp.org
- paoappellateunitmail@kingcounty.gov
- wapofficemail@washapp.org
- wendyo@atg.wa.gov

Comments:

Sender Name: Kristin Jensen - Email: kristinj@atg.wa.gov
Filing on Behalf of: Cristina Marie Hwang Sepe - Email: cristina.sepe@atg.wa.gov (Alternate Email:)

Address:
PO Box 40100
1125 Washington St SE
Olympia, WA, 98504-0100
Phone: (360) 753-4111

Note: The Filing Id is 20200207153901SC161699